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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RAY ANTHONY HERNANDEZ, Defendant and Appellant.	G039735 (Super. Ct. No. 02CF2687) O P I N I O N
In re RAY ANTHONY HERNANDEZ on Habeas Corpus.	G040934

Appeal from a judgment of the Superior Court of Orange County, James A. Stotler, Judge. Affirmed. Original proceedings; petition for writ of habeas corpus, after judgment of the Superior Court of Orange County. Petition denied.

Sylvia Whatley Beckham, under appointment by the Court of Appeal, for Defendant, Appellant and Petitioner.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil Gonzalez, Jeffrey Koch and Gary W. Brozio, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Ray Anthony Hernandez was convicted of murder. He appeals from his conviction, arguing a number of errors by the trial court and by his trial counsel. As explained in detail, *post*, defendant has not shown prejudicial error on any point, and we affirm his conviction. Defendant is entitled, however, to presentence custody credits against his indeterminate sentence. We direct the trial court to amend the abstract of judgment accordingly.

Defendant also petitions for a writ of habeas corpus, contending he received ineffective assistance of counsel. We conclude either defendant's trial counsel's performance was not deficient, or any deficient performance was not prejudicial. Therefore, we deny the petition.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Prosecution's Case-in-chief

Fagafaga Mulipola was stabbed to death by defendant during the evening of October 11, 2002, in the driveway in front of a residence at 7842 Santa Catalina in Stanton. The location is in an area claimed by the Crow Village criminal street gang as its "territory."

Two or three weeks before the stabbing, defendant was outside 7842 Santa Catalina making noise late at night. One of the residents, Rose Hernandez, told defendant to keep the noise down because children were sleeping. Defendant responded by yelling, "don't fucking tell me what to do. You need to fucking respect me," and "you don't know me. You need to fucking respect me." Mulipola came outside and told

defendant, "don't talk to Auntie Rose like that." After 15 or 20 minutes of verbal sparring and cursing, at Hernandez's request, Mulipola walked away. Defendant remained in the area, and continued yelling and cursing for some time.

Later that same night, Mulipola and defendant had another confrontation. Mulipola was standing in the street in front of 7842 Santa Catalina, while defendant rode his bicycle in circles around Mulipola. Mulipola and defendant yelled at each other for about 10 minutes. Defendant said to Mulipola, "I'll be back, I'm gonna get you. Don't be here." Mulipola replied, "I'll be here." Defendant again said, "[y]ou better not be here. I'll be back." Defendant eventually left.

Less than one week before the stabbing, defendant told Agnes Sauta, Mulipola's aunt, that she should "check" her nephew who "just keeps running away with his mouth." Defendant also told Sauta that Mulipola had stated "F Crow Village" and was disrespecting defendant and his "hood." Sauta asked defendant why he had threatened Mulipola with a "187," which Sauta understood to mean murder; defendant replied that Mulipola "was going to get his" and defendant wanted Mulipola to stay away.

On October 11, 2002, the day of the stabbing, defendant and Mulipola had another argument at 7842 Santa Catalina. After Mulipola left, defendant said he "better not come back . . . [¶] . . . [¶] . . . [o]r I'll get you." Defendant was described as angry. Defendant was overheard saying he was "gonna do this."

On the evening of that same day, Mulipola told defendant he wanted to "squash" their argument, or put an end to it. Both men walked to the driveway of 7842 Santa Catalina. An argument ensued between the two. Defendant appeared to strike Mulipola on the arm a single time, and kicked Mulipola in the stomach. Defendant threatened Mulipola's friends with the knife, and ran away with two other members of the Crow Village gang.

Mulipola died due to loss of blood, caused by a stab wound to the heart. He had also suffered two stab wounds in the upper left arm.

The morning after the stabbing, witnesses noticed a surveillance camera that was trained on the driveway had been covered by an empty "Cup Noodles" container. The lens had not been covered earlier the previous day.

A gang expert testified that as of October 11, 2002, defendant was an active member of the Crow Village criminal street gang, and the stabbing of Mulipola had been committed for the benefit of the gang.

Defense Evidence

Defendant admitted he had previously been a member of the Crow Village gang, but claimed he had been "jumped out" of the gang at his own request in 1993. Defendant had an ongoing dispute with Mulipola, and testified Mulipola had disrespected him in territory claimed by the Crow Village gang.

Defendant admitted he stabbed Mulipola once with a kitchen knife, but claimed he was acting in self-defense. Before their confrontation on October 11, 2002, defendant saw Mulipola with a fanny pack, and defendant grabbed a knife from the kitchen to protect himself. On the driveway, Mulipola said he would kill defendant. Mulipola then stepped forward, pulled up his shirt, reached behind his back, and pulled out a shiny, chrome object. Defendant then stabbed Mulipola, but did not intend to kill him. Mulipola came at defendant, again threatening to kill him. Defendant kicked Mulipola in the stomach, fled, and discarded the knife.

While in jail awaiting trial for Mulipola's murder, defendant wrote a "kite" requesting a roll call of gang members in the jail, and referred to himself in the kite as "P.C.V." or "Panther, Crow Village."[1]

[1] A kite is a note passed illegally between inmates, or passed by an inmate to someone outside the prison. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 800.) A roll call is a roster of gang members. (*People v. Woods* (1991) 226 Cal.App.3d 1037, 1045.)

Procedural History

Defendant was charged in an information with first degree murder (Pen. Code, § 187, subd. (a)), with a special circumstance of lying in wait (*id.*, § 190.2, subd. (a)(15)). (All further statutory references are to the Penal Code.) The information alleged defendant personally used a deadly weapon (§ 12022, subd. (b)(1)), and the murder was committed for the benefit of, at the direction of, or in association with a criminal gang with the specific intent to promote, further, or assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)). The information also charged defendant with street terrorism (§ 186.22, subd. (a)).

A jury convicted defendant of both counts, and found the personal use of a deadly weapon and gang enhancement allegations to be true. The jury found the special circumstance allegation not to be true. Defendant's posttrial motions for a new trial or alternatively for a reduction of the degree of the offense were denied.

Defendant was sentenced to a total prison term of one year plus 25 years to life.

DISCUSSION

I.

THERE WAS SUFFICIENT EVIDENCE SUPPORTING THE CONVICTION FOR FIRST DEGREE MURDER.

Defendant argues there was insufficient evidence of lying in wait to support his conviction for first degree murder. "'In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence.

(*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We may reverse for lack of substantial evidence only if "'upon no hypothesis whatever is there sufficient substantial evidence to support'" the conviction. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

A defendant commits first degree murder by lying in wait if he or she, (1) while concealing his or her purpose from the victim, and (2) after waiting and watching for an opportunity to act, (3) from a position of advantage intends to and does make a surprise attack on the victim. (*People v. Stanley* (1995) 10 Cal.4th 764, 794; CALCRIM No. 521.)

We do not need to decide whether the evidence was sufficient to support a conviction for first degree murder by lying in wait. Even if the evidence were insufficient, we would nevertheless affirm the conviction because there is another ground supporting the jury's first degree murder conviction—premeditation and deliberation. Defendant concedes the premeditation and deliberation theory was legally proper and factually sufficient. Defendant argues, however, that when the prosecution presents alternate theories of liability, only one of which is legally correct, the conviction must be reversed if the reviewing court cannot determine from the record on which theory the jury relied. (*People v. Green* (1980) 27 Cal.3d 1, 69.) Our Supreme Court has subsequently held that its opinion in *People v. Green* applies only to cases of legal, not factual, insufficiency: "If the inadequacy of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground. But if the inadequacy is legal, not merely factual, that is, when the facts do not state a crime under the applicable statute, as in *Green*, the *Green* rule requiring reversal applies, absent a basis in the record to find that the verdict was actually based on a valid ground." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.)

Here, the alleged inadequacy is factual, not legal. There is no affirmative indication in the record supporting a finding that the jury's verdict was based on the lying

in wait theory, rather than on premeditation and deliberation. To the contrary, the jury found not true the special circumstance allegation that the murder was committed by means of lying in wait. Although there are differences between the elements of the crime of murder while lying in wait and the elements of the special circumstance of murder committed by means of lying in wait, reversal is not required because a valid ground for the verdict remains—premeditation and deliberation.

II.

DEFENDANT'S TRIAL COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE BY FAILING TO PRESENT EXPERT WITNESS TESTIMONY REGARDING THE NUMBER OF STAB WOUNDS SUFFERED BY MULIPOLA, OR BY MAKING STATEMENTS DURING OPENING AND CLOSING ARGUMENT REGARDING DEFENDANT'S GUILT.

Defendant argues his trial counsel provided ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, defendant must prove both: (1) his attorney's representation was deficient in that it fell below an objective standard of reasonableness under prevailing professional standards; and (2) his attorney's deficient representation subjected him to prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Cain* (1995) 10 Cal.4th 1, 28.)

"Unless a defendant establishes the contrary, we shall presume that 'counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy.' [Citation.] If the record 'sheds no light on why counsel acted or failed to act in the manner challenged,' an appellate claim of ineffective assistance of counsel must be rejected 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.' [Citations.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 746.) We reverse on direct appeal for ineffective assistance of counsel only when "the record on appeal demonstrates there could be no rational tactical purpose for counsel's omissions." (*People v. Lucas* (1995) 12 Cal.4th 415, 442.)

If a defendant establishes his or her counsel's performance was deficient, prejudice must then be established. Prejudice means a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington, supra,* 466 U.S. at p. 694.) A reasonable probability means a "probability sufficient to undermine confidence in the outcome." (*Ibid.*)

A. *Three stab wounds*

First, defendant argues his trial counsel was ineffective for failing to present expert witness testimony explaining how a single stabbing motion by defendant could have resulted in three separate stab wounds. All the eyewitnesses to the stabbing testified defendant stabbed Mulipola one time. Defendant admitted stabbing Mulipola once. Defendant suggests his contention that he was acting in self-defense would have been more tenable if he had only stabbed Mulipola once, rather than three times.

Defendant refers to a police report taken at the emergency room, stating, "[i]t was believed the knife probably went through the bicep and into the chest." The report does not indicate whose belief is recorded, nor is the author of the report identified. Defendant also refers to a sheriff's department follow-up report, prepared by G. Jones, describing his or her observation of the autopsy of Mulipola's body. This report states: "I also noted that the victim had a wound to the left upper outer and inner bicep. The wound appeared to be a through and through the upper left bicep muscle and into the left side chest wall, just below the armpit." The report, however, also includes the coroner's opinion, which was different from G. Jones's observations: "Doctor Juguilon advised that after closer examination, the wounds to the left outer and inner bicep were separate wounds and the wound to the left side of the victim's chest was also separate from the wounds to the left arm. [¶] Doctor Juguilon stated that the wound to the victim's left outer bicep was a 1 & 3/4 inch in depth wound and was a downward wound. He stated

that the wound to the victim[']s left inner bicep was a 2 & 1/2 inch in depth wound and was also a downward wound. Doctor Juguilon stated that the wound to the victim's left side chest was 7 & 1/2 inches in depth to the heart[,] however it could be less due to chest and skin compression."

In support of defendant's petition for a writ of habeas corpus, his trial counsel provided a declaration which states, in relevant part: "1. I do not remember the reason I did not present a defense expert to explain how the victim's body could appear to have incurred three wounds while each eye witness[] described a single thrust of the knife; [¶] 2. I was aware of reports reflecting that emergency room medical personnel and G. Jones formed the opinion from observation of the body that there was a single stab wound through the bicep and into the chest; [¶] [3]. I did not present the testimony of the emergency room medical personnel or G. Jones that the body appeared to have suffered a single stab wound through the bicep and into the chest because I believed I could overcome the conclusion of Dr. Juguilon by cross examination of that prosecution witness."

Defendant's trial counsel was not ineffective for failing to offer an expert witness to challenge the coroner's findings of the number of stab wounds. "[A] trial attorney is not remiss for failing to present additional scientific or medical evidence rather than relying upon the opinions of the prosecution experts where there is no cause to suspect that additional expert testimony or evidence would lead to a different conclusion." (*People v. Adkins* (2002) 103 Cal.App.4th 942, 952.) Even if defendant's trial counsel had been deficient in failing to offer his own medical expert, defendant has not established a reasonable probability that with additional expert testimony, the result would have been any different. Defendant has not offered any opinion of any medical professional challenging the coroner's actual autopsy findings.

B. *Concessions of defendant's guilt*

Second, defendant argues his trial counsel provided ineffective assistance by making concessions about defendant's guilt during the opening statement and closing argument. In his opening statement, defendant's counsel said the prosecutor's statement of the facts "sounds pretty overwhelming," but then reminded the jury that the prosecutor's statements were not evidence, and laid out his own theory of the case.

In his closing argument, defendant's counsel told the jury, "there's no doubt that my client—and we've never contested this—killed Fagafaga Mulipola. And it's unfortunate. That's what he's facing, and he's facing first degree murder. Every killing does not result in a first degree murder situation. It depends on the facts and the circumstances. But it may result in something that's going to cause my client some problems, like second degree murder, manslaughter. [¶] And the judge is actually going to even give you an instruction o[n] the possibility of finding him not guilty, and I'm not requesting that frankly. I don't believe—I believe he's guilty of something. I'm not going to stretch your imagination and argue something that I believe is preposterous under the circumstances."

In the declaration attached to defendant's petition for a writ of habeas corpus, defendant's trial counsel stated: "I hoped for a conviction on less than first degree murder and I do not recall in what manner, if any, that my closing argument purportedly conceded that [defendant] was guilty of less than first degree murder, but at least guilty of something."

Defendant admitted stabbing Mulipola. Defendant's testimony that he believed Mulipola had something shiny in his hand was not corroborated by the testimony of any eyewitness or any physical evidence. Defendant's counsel was not ineffective in conceding some degree of defendant's guilt, given the evidence in the case, in order to maintain credibility with the jury. (*People v. Samayoa* (1997) 15 Cal.4th 795, 846-847; *People v. Freeman* (1994) 8 Cal.4th 450, 496-500; *People v. Mayfield* (1993)

5 Cal.4th 142, 176-177; *People v. McPeters* (1992) 2 Cal.4th 1148, 1186-1187; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1060-1061.)

III.

THE TRIAL COURT'S STATEMENT THAT A TRIAL IS A SEARCH FOR THE TRUTH WAS NOT IMPROPER, AND DEFENDANT'S TRIAL COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO IT.

During jury selection, the trial court made the following statement: "One thing I should tell you folks, so simple almost needs not to be addressed, and that is what a jury trial is all about, and bottom line it's a search for the truth. That's what we are in here for. It's [a] search for the truth. [¶] And what you do is you listen to the facts of the case and having heard all of the evidence, that is to say the facts, and having been given the law by me at the end of the case, you determine whether the facts that you find constitute a violation of that law." Defendant argues this statement unfairly suggested there was a "truth" beyond the scope of the evidence that would be presented. Defendant's argument is disproved by the very language quoted *ante*. The trial court clearly informed the jury it would discover the "truth" by listening to the "facts of the case" and considering the law with which it was instructed. There was no error.

Defendant also argues on appeal that the court misstated the burden of proof, and misinformed the jury on the concept of reasonable doubt. We disagree. Even if the statement could somehow be read as addressing, much less incorrectly setting forth, those concepts, the jury was properly and correctly preinstructed on the presumption of innocence and reasonable doubt, and was again instructed on those concepts at the conclusion of the trial. We presume the jury followed the instructions it was given. (*People v. Najera* (2006) 138 Cal.App.4th 212, 228.)

Because the trial court's statement was not a misstatement of the law, and did not deprive defendant of due process, defendant's trial counsel cannot have been ineffective for failure to object. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1,

101, fn. 33 [where there is no prejudicial error, appellate court need not consider related claim of ineffective assistance of counsel].)

IV.

THE TRIAL COURT DID NOT ERR BY PERMITTING A LAY WITNESS TO TESTIFY AS TO DEFENDANT'S "STATE OF MIND."

Defendant argues the trial court erred by permitting a witness to testify as to his state of mind. An acquaintance of Mulipola and defendant overheard defendant, on October 11, 2002, say "he was gonna do this":

"Q. Do you recall telling Investigator Hoffman how [defendant] was acting, whether he was angry or not when he said I'm going to do this?

"A. No, I don't remember.

"Q. If I show you the transcript, it might refresh your recollection.

"A. Okay. [¶] . . . [¶]

"Q. Okay. Do you recall speaking with Investigator Hoffman regarding what the defendant's state of mind was at the time that he made that statement about he was going to do it?

"A. Yes.

"Q. Did you have an opportunity to read the transcript to refresh your recollection?

"A. Yes, I have.

"Q. And do you recall what the defendant's state of mind was at the time?

"[Defendant's counsel]: I would object. It calls for a conclusion beyond the witness's knowledge.

"The Court: The objection is overruled. [¶] You can answer.

"The witness: Anger."

A trial court's decision to admit evidence is reviewed for abuse of discretion. (*People v. Vieira* (2005) 35 Cal.4th 264, 292.) "Generally, a lay witness may

not give an opinion about another's state of mind. However, a witness may testify about objective behavior and describe behavior as being consistent with a state of mind." (*People v. Chatman* (2006) 38 Cal.4th 344, 397 [proper for lay witness who observed the defendant repeatedly kick a high school custodian to testify the defendant "'seemed to be enjoying'" it].) Although the prosecutor asked the witness to describe defendant's state of mind, it is clear from the context of the questioning that what was actually being sought, and what the witness testified to, was that the tone of defendant's voice denoted anger. This is permissible testimony from a lay witness. (*People v. Deacon* (1953) 117 Cal.App.2d 206, 210.)

V.

THE TRIAL COURT DID NOT ERR BY LIMITING DEFENDANT'S CROSS-EXAMINATION OF THE PROSECUTION'S EXPERT WITNESS ON GANGS.

Defendant argues the trial court erred by limiting his trial counsel's cross-examination of the prosecution's gang expert witness. We review the court's ruling on the admission or exclusion of evidence for abuse of discretion. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 8-9.)

Sauta testified that she asked defendant why he had threatened Mulipola with a "187," and defendant replied that Mulipola "was going to get his." The prosecution's gang expert testified that in gang culture, "putting out a 187 on someone's life" has severe consequences, and is a challenge "that when you see them [you're] going to kill them." The gang expert further testified that once a gang member issued such a challenge, he would not back down from a later altercation, because to do so would cause him to lose respect within his gang.

On cross-examination, the gang expert testified there was no evidence in this case to suggest that the crime was gang related, or that Mulipola was a gang member. The expert also testified that in reaching his conclusions, he had reviewed reports from Hawaii and Utah regarding Mulipola's involvement in an assault and in a robbery in

those states. After a discussion outside the presence of the jury, the trial court determined further testimony about Mulipola's criminal history and claimed gang membership should be excluded. The trial court ruled as follows: "It doesn't seem to me that the Utah incident nor the Hawaii incident is admissible here, it's irrelevant and it's more prejudicial than probative; that is, it's prejudicial to the People's case because it sort of besmirches the victim and has little or no probative value. [¶] . . . [¶] . . . I think all three of these areas are irrelevant, Hawaii, Utah, and the fact that the victim was a wannabe gangster or acted with bravado or however you want to say it. There's no indication whatsoever that this was—that he's a rival gang member or that this was somehow actioned by the defendant toward another gangster. This whole area is extremely speculative. [¶] So, these three areas are excluded as irrelevant and under [section] 352 of the Evidence Code they're more prejudicial than probative and there's speculation involved in this, conclusions, et cetera. So, with that, those three areas are excluded."

On appeal, defendant contends that if he had been permitted to cross-examine the expert witness regarding Mulipola's criminal history and claimed gang membership, he could have called into question the expert's opinion that Mulipola was not a gang member. Defendant argues this would have affected the expert's overall credibility and would have undermined the expert's opinion that once a gang member puts out a "187," he must follow through on the threat or lose respect within the gang.

Even if the trial court abused its discretion in limiting the cross-examination of the prosecution's gang expert, any error was harmless. Defendant's trial counsel conceded he had no evidence that Mulipola was a gang member in Utah or Hawaii, or that Mulipola's criminal acts in those states were gang related. Evidence had been adduced at trial that Mulipola was a member of a car club, but the other members of the club denied they were a gang. Defendant's counsel made no offer of proof that he had any actual evidence of Mulipola's alleged gang membership. Even if the trial court had permitted further cross-examination, it is not reasonably probable a result more

favorable to defendant would have been reached. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

VI.

THE PROSECUTOR DID NOT COMMIT MISCONDUCT BY QUESTIONING DEFENDANT ABOUT THE VERACITY OF OTHER WITNESSES, AND DEFENDANT'S COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO THE PROSECUTOR'S QUESTIONS.

Defendant testified that although he had been a member of the Crow Village gang, he was "jumped out" of the gang in 1993. Defendant then testified he had been asked "[s]everal times" by police officers whether he was an active gang member. Defendant also testified that although he told the officers he was not an active gang member, the officers said he was a gang member because of his tattoos, and they marked field identification cards showing defendant had confirmed his gang membership "because they want[ed] to be cute."

When the prosecutor asked defendant if the police officers were lying on the field identification cards when they wrote that he admitted being an active gang member, defendant replied, "[y]es." Defendant was shown two field identification cards completed after the date he claimed to have been jumped out of the gang, on which the officers had marked defendant was a self-admitted active gang member. Defendant denied admitting active gang membership, and replied, "[y]es," when asked if those officers were lying when they completed the field identification cards. Defendant denied admitting active gang membership to any officer completing a field identification card. Defendant claimed "they" had instructed him to write on a field identification card that Crow Village gang was the best. Finally, defendant was questioned about a 1991 arrest for possession of a firearm. The arresting officer's report stated the gun was found under defendant's seat in a car; defendant claimed the gun was in the trunk and the officer was lying in his report.

Our Supreme Court has explained the method by which we must determine whether a testifying defendant may be asked if other witnesses were lying. "[C]ourts should carefully scrutinize 'were they lying' questions in context. They should not be permitted when argumentative, or when designed to elicit testimony that is irrelevant or speculative. However, in its discretion, a court may permit such questions if the witness to whom they are addressed has personal knowledge that allows him to provide competent testimony that may legitimately assist the trier of fact in resolving credibility questions." (*People v. Chatman*, *supra*, 38 Cal.4th at p. 384.)

If a defendant has personal knowledge of his or her own actions, and testifies on direct examination that other witnesses are untruthful, he or she opens the door to "'were they lying'" questions on cross-examination: "Although it is true that to ask one witness for an opinion regarding other witnesses' credibility may be improper, in that such 'were they lying' questions might merely call for speculation from that witness, in the present case, defendant, who had personal knowledge of whether he abused these women in the manner to which they testified, opened the door to the prosecutor's questions by testifying in his direct examination that these witnesses were untruthful." (*People v. Riggs* (2008) 44 Cal.4th 248, 318 [the defendant was charged with murder committed during the course of a robbery; the prosecutor properly asked the defendant on cross-examination whether his former wives and girlfriends were lying when they testified he had abused them, and why they would do so].)

In *People v. Tafoya* (2007) 42 Cal.4th 147, 179, the Supreme Court concluded the prosecutor did not commit misconduct by asking the defendant a series of questions about whether a codefendant and an eyewitness were lying in their testimony. "Here, by choosing to testify, defendant put his own veracity in issue. . . . The prosecution's questions allowed defendant to clarify his position and to explain why codefendant Wynglarz or eyewitness Gattenby might have a reason to testify falsely. The jury properly could consider any such reason defendant provided; if defendant had no

explanation, the jury could consider that fact in determining whether to credit defendant's testimony. [Citation.] Thus, the prosecution's questions in this case 'sought to elicit testimony that would properly assist the trier of fact in ascertaining whom to believe.' [Citation.]" (*Ibid.*)

Here, defendant put his own veracity at issue. Defendant testified he was jumped out of the Crow Village gang in 1993, and further testified that in his encounters with the police after that date, he denied active gang membership. Defendant also testified that when he was arrested for firearm possession in 1991, the gun was located in the trunk of the car in which he was riding, not under his seat as stated in the police report. Defendant had personal knowledge of his contacts with the police, and of his arrest for possession of a firearm. The reports of defendant's 1991 arrest, and of his post-1993 encounters with police were completely at odds with defendant's testimony. In this case, asking defendant if the police were lying in their reports, and why they would lie in their reports, allowed defendant to provide competent testimony that could legitimately assist the jury resolve the issue of whose testimony was more credible. There was no prosecutorial misconduct.

Because the questions were not improper, defendant's trial counsel did not provide ineffective assistance by failing to object to them. (*People v. Coffman and Marlow, supra,* 34 Cal.4th at p. 101, fn. 33.)

VII.

THE PROSECUTOR'S CLOSING ARGUMENT DID NOT SHIFT THE BURDEN OF PROOF TO DEFENDANT, AND DEFENDANT'S TRIAL COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO THE ARGUMENT.

Defendant argues the prosecutor committed misconduct during closing argument by attempting to shift the burden of proof to defendant.

In closing argument, defendant's trial counsel claimed there was insufficient evidence the murder was committed for the benefit of, at the direction of, or

in association with a criminal street gang. Defendant's trial counsel suggested the only evidence of a gang connection was the opinion testimony of the prosecution's gang expert.

On rebuttal, the prosecutor challenged defendant's counsel's attempt to discredit the gang expert's opinion testimony. "[Defendant]'s not an active gang member because [the expert] doesn't have any experience, who's infused himself in the life of a gang, has put himself out on the street, has talked to hundreds of gang members who know[] about the gang culture. [The expert] doesn't know what he's talking about as far as the defendant being an active participant. [¶] And, folks, the defense attorney has a subpoena power just like the People. They can call in any witnesses they want. Did you hear an expert from the defense saying that the defendant is not an active gang member? Did you see or hear an expert from the defense that said [the expert] is full of it? Did you see any of that? No."

A prosecutor may generally comment on a defendant's failure to introduce material evidence or call logical witnesses. (*People v. Wash* (1993) 6 Cal.4th 215, 262-263; *People v. Lewis* (2004) 117 Cal.App.4th 246, 257.) "A distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1339-1340 ["brief comments by the prosecution during closing argument noting the absence of evidence contradicting what was produced by the prosecution on several points, and the failure of the defense to introduce material evidence or any alibi witnesses" were not prosecutorial misconduct].)

In this case, the prosecutor's closing argument fairly and properly commented on defendant's failure to call a witness who might have rebutted the prosecution's gang expert witness as to the likelihood the murder of Mulipola was committed for the benefit of, at the direction of, or in association with a criminal street

gang. The prosecutor did not improperly attempt to shift the burden of proof on any issues to defendant, and there was no misconduct by the prosecutor. Therefore, defendant's trial counsel did not provide ineffective assistance by failing to object to the prosecutor's argument. (*People v. Coffman and Marlow, supra,* 34 Cal.4th at p. 101, fn. 33.)

VIII.

THE TRIAL COURT'S RESPONSE TO THE JURY'S REQUEST FOR CLARIFICATION ON THE FIRST DEGREE MURDER INSTRUCTIONS WAS PROPER, AND DEFENDANT'S TRIAL COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE BY FAILING TO REQUEST ADDITIONAL INSTRUCTIONS.

During deliberations, the jury sent a note reading: "We need clarification on first degree murder [¶] – if we agree on implied malice, does that rule out first degree? [¶] – 'concealed "purpose" from person killed' clause question – can purpose mean purpose/intent to kill *or* purpose/intent to stab (and that stabbing resulted in killing person)." After consulting with the attorneys, the trial court sent the jury a note reading: "1. If you have ruled out express malice, that is to say, an intent to kill, but agree that the killing was committed with implied malice, that does rule out first degree murder. [¶] 2. The lying in wait theory of 1st degree murder defined in CALCRIM [No.] 521 does not require an intent to kill. It requires, among the other elements defined therein, that the defendant, from a position of advantage, intend to, and make, a surprise attack on the person killed. [¶] The separate and distinct special circumstance allegation of murder committed by means of lying in wait which is defined in CALCRIM [No.] 728 does require an intent to kill as one of the elements of the special circumstance allegation."

We review the trial court's additional instruction to the jury for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 745-746.) "The court has a primary duty to help the jury understand the legal principles it is asked to apply. [Citation.] This does not mean the court must always elaborate on the standard instructions. Where the

original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.]" (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.)

Defendant argues the trial court's response to the jury's question was inadequate to prevent the jury from convicting defendant of first degree murder while nevertheless finding malice had been negated.[2] "Although the court told the jury that if they ruled out express malice, that ruled out first degree murder, [the] lying in wait theory of first degree murder can be proven where the homicide is committed with only implied malice. [Citation.] However, if a lying in wait killing is committed in the heat of passion or under the actual but unreasonable belief in the necessity to use deadly force in self[-]defense, malice is negated and the killing is no more than a voluntary manslaughter. Without additional clarification, the jury could have concluded that [defendant] was acting without an intent to kill because he was acting in the belief in the necessity to use deadly force, and still found [defendant] guilty of first degree murder because he intended to stab Mulipola in self-defense by making a surprise attack from a position of advantage."

The Attorney General correctly notes that the jury did not ask for clarification on the relationship between the concepts of first degree murder and of voluntary manslaughter. The jury was fully instructed on all of these concepts, and we presume the jury understood and considered all of the instructions in their entirety. (*People v. Najera, supra,* 138 Cal.App.4th at p. 228.) The trial court did not err in failing to provide any additional instructions to the jury.

[2] Because defendant's trial counsel did not request further clarifying instructions, the Attorney General argues the issue has been waived. Defendant also argues ineffective assistance of counsel in failing to request further clarification or additional instructions, so we will address the merits of the issue.

Defendant's appellate briefs argue his trial counsel was ineffective for failing to request further clarification or additional instructions. His petition for a writ of habeas corpus does not claim trial counsel was ineffective, however, and the declaration attached to the petition does not address this issue. Under these circumstances, we may only reverse for ineffective assistance of counsel if the alleged deficiency of counsel's performance is demonstrated by the record on appeal. "[U]nless the record reflects the reason for counsel's actions or omissions, or precludes the possibility of a satisfactory explanation, we must reject a claim of ineffective assistance raised on appeal. [Citation.] Such claims are more appropriately addressed in a habeas corpus proceeding. [Citation.]" (*People v. Ledesma, supra,* 39 Cal.4th at p. 746.) Nothing in the appellate record establishes defendant's trial counsel was ineffective.

IX.

CUMULATIVE ERROR

Defendant argues the cumulative negative impact of the errors claimed on appeal and in his petition for a writ of habeas corpus requires reversal of the murder conviction. As explained in detail, *ante*, we do not agree that the trial court committed any error prejudicing defendant. Nor can we conclude that defendant received ineffective assistance of counsel at trial. Therefore, we must also reject defendant's argument that the cumulative effect of these alleged errors prejudiced him.

X.

THE ABSTRACT OF JUDGMENT MUST BE CORRECTED.

Defendant was granted 1,884 days of presentence custody credit. This credit was listed only on the abstract of judgment for defendant's determinate sentence, not on the abstract of judgment for defendant's indeterminate sentence. The Attorney General agrees that defendant is entitled to presentence custody credit on the entire judgment. (§ 2900.5.) We therefore direct the trial court to amend the abstract of

judgment for defendant's indeterminate sentence to reflect his 1,884 days of presentence custody credit.

DISPOSITION

The judgment is affirmed. The petition for a writ of habeas corpus is denied. We direct the trial court to amend the abstract of judgment for defendant's indeterminate sentence to reflect 1,884 days of presentence custody credit. We further direct the trial court to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

FYBEL, J.

WE CONCUR:

SILLS, P. J.

BEDSWORTH, J.